

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMERICAN CIVIL LIBERTIES UNION OF
WASHINGTON, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY, et al.,

Defendants.

No. C17-00562-RSL

JOINT STATUS REPORT AND
DISCOVERY PLAN

Pursuant to the Court's Order Regarding Joint Status Report ("Order," Dkt. No. 9), the parties to this action jointly submit this Joint Status Report and Discovery Plan.

For reasons discussed below, the parties jointly request that the Court set August 25, 2017, as the date for the parties to submit another Joint Status Report and Discovery Plan.

1. Nature and complexity of the case: This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. It is based on the FOIA request submitted by Plaintiffs on February 2, 2017 and attached as Exhibit A to the Complaint (Dkt. No. 1).

2. Proposed deadline for joining additional parties: September 15, 2017.

3. Consent to Assignment to Magistrate: No.

4. Related cases: The Order notes the Court is aware of the 12 other matters Defendants have sought to transfer, along with this case, to the Judicial Panel on Multidistrict

1 Litigation. Plaintiffs do not believe these are “related cases,” for reasons noted in prior filings
 2 (see Dkt. Nos. 3, 15), and are not aware of any other case in this or any other jurisdiction that
 3 could be considered “related” to this FOIA action. Plaintiffs do not believe the cases noted by
 4 Defendants below are “related cases,” under LCR 3(g) or otherwise. Nor do Plaintiffs believe
 5 the number of FOIA requests about the subject Executive Order (“Protecting the Nation From
 6 Foreign Terrorist Entry Into the United States”) relevant to this case, except as an indication of
 7 the profound public interest in the Defendants’ interpretation and implementation of that order..

8 Defendants note that, in addition to the ACLU cases of which this Court is already
 9 aware, there are several other FOIA suits that have been filed against the U.S. Department of
 10 Homeland Security and/or U.S. Customs and Border Protection concerning FOIA requests
 11 seeking records related to Executive Order 13769. These cases include: *James Madison*
 12 *Project, et al. v. DHS*, No. 17-cv-388 (D.D.C.); *James Madison Project, et al. v. DOJ, et al.*,
 13 No. 17-cv-390 (D.D.C.); *James Madison Project, et al. v. DHS*, No. 17-cv-1281 (D.D.C.);
 14 *American-Arab Anti-Discrimination Committee v. CBP*, No. 17-cv-708 (D.D.C.); *Muslim*
 15 *Advocates v. DHS*, No. 17-cv-813 (D.D.C.); *Muslim Advocates v. DHS*, No. 17-cv-820
 16 (D.D.C.); *Currier v. DHS, et al.*, No. 17-cv-1799 (N.D. Cal.); and *Council on American-Islamic*
 17 *Relations-Connecticut, et al. v. USCIS, et al.*, No. 17-cv-1061 (D. Conn.). Defendants have
 18 received over 100 FOIA requests which relate to the same general subject matter, so additional
 19 lawsuits may be filed. Defendants do not necessarily assert that these cases are all “related”
 20 within the meaning of Local Civil Rule 3(g), but bring these additional cases and FOIA
 21 requests to the Court’s attention given the similarity in the subject of the requests and/or the
 22 records requested, and the demands that they place on Defendants’ limited resources.

23 **5. Discovery plan:**

24 **Preliminary statement:** To date, no discovery has taken place, and the parties agree
 25 that it would be premature to set a discovery schedule at this time.

26 Plaintiffs state that discovery is often unnecessary in FOIA cases, and may be
 27 unnecessary here. Plaintiffs also state, however, that it is premature to foreclose discovery.

1 Contrary to Defendants' statement below, courts have found discovery appropriate in FOIA
2 cases, including on the issue of the adequacy of an agency's search. *See, e.g., Weisberg v.*
3 *United States Dept. Of Justice*, 627 F.2d 365, 371 (D.C. Cir. 1980). Plaintiffs also disagree
4 with Defendants' suggestion below that they would be entitled to discovery into
5 communications among various ACLU entities, and reserve the right to object to such
6 discovery.

7 Defendants state that discovery is generally unavailable to plaintiffs in FOIA actions.
8 The adequacy of an agency's search for records responsive to a FOIA request and the
9 appropriateness of an agency's decision to withhold information are ordinarily determined on
10 the basis of declarations supplied by the agency, which the court may direct the agency to
11 supplement with additional information if the court finds that the agency's initial submissions
12 do not establish the agency's compliance with the FOIA.

13 Defendants additionally state that, if the Judicial Panel on Multidistrict Litigation denies
14 Defendants' motion to consolidate this action with the parallel FOIA actions filed by other
15 ACLU affiliates in twelve other courts, Defendants may seek discovery regarding Plaintiffs'
16 coordination with the national ACLU and other ACLU affiliates in filing their respective FOIA
17 requests and lawsuits. Defendants may seek such discovery in order to establish grounds for
18 nonparty preclusion in the event that Plaintiffs seek to re-litigate in this action issues that have
19 been decided against one or more other ACLU affiliates.

20 Defendants made an initial release of records on July 14, 2017. Defendants have
21 advised Plaintiffs that CBP's search for, and processing of, records responsive to Plaintiffs'
22 FOIA request is ongoing, but more time is needed to assess the volume of potentially
23 responsive material requiring further review. Defendants also anticipate requesting that
24 Plaintiffs clarify the scope of Part 1 of their FOIA request.

25 Defendants have proposed that the parties confer and submit another Joint Status Report
26 in one month, when the agencies expect to have further information. Plaintiffs agree to this
27 proposal, on the understanding that the agencies will be prepared, at the time of the next Joint

Status Report, to provide additional information about CBP's anticipated timing for completing its search and for producing records. Plaintiffs reserve the right, at that time, to ask the Court to set a schedule for the agencies to complete their search and produce records and a *Vaughn* index. Accordingly, the parties jointly request that the Court set **August 25, 2017** as the date for the parties to submit another Joint Status Report and Discovery Plan. The parties will confer cooperatively ahead of that submission.

A. Discovery regarding agency's search/sufficiency of production:

Plaintiffs are unable to state at this time whether discovery into these areas will be necessary, for reasons stated above. They anticipate responding more completely in the next Joint Status Report noted above. Defendants respectfully refer the Court to the above Preliminary Statement.

B. Discovery management: The parties respectfully refer the Court to the above Preliminary Statement.

C. Deadline for administrative record and/or the *Vaughn* indices: See Preliminary Statement above regarding the filing of a Joint Status Report on August 25, 2017.

6. Discovery deadline: See point 5, Preliminary Statement.

7. Prompt and efficient resolution: The parties anticipate this case will be fully resolved on a motion or cross-motions for summary judgment.

8. Dispositive motion briefing schedule: See Section 5, above. The parties agree further information is required regarding Defendants' search for and production of records before a briefing schedule can be set.

9. Trial: The parties anticipate this case will be fully resolved on summary judgment. They do not request a trial date.

10. Jury: No party has requested a jury.

11. Trial days: The parties anticipate this case will be fully resolved on summary judgment. They do not request a trial date.

1 **12. Corporate disclosures:** Plaintiffs (the only non-governmental entities in this
2 matter) made the required FRCP 7.1 and LCR 7.1 disclosures on April 18, 2017 (Dkt. No. 4).

3 **13. Service:** All Defendants have been served.

4 **14. Consent to Pilot Project on Cameras in the Courtroom:** No.

5 DATED this 21st day of July, 2017.

Davis Wright Tremaine LLP

By /s/Eric M. Stahl

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on July 20, 2017, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the attorneys of record registered on the CM/ECF system. All other parties (if any) shall be served in accordance with the Federal Rules of Civil Procedure.

DATED this 20th day of July, 2017.

/s/Eric M. Stahl

Eric M. Stahl, WSBA #27619